IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 368

CENTRAL MARKETING SALES, LTD., *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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The petitioner, Central Magazine Sales, Ltd., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit, entered in this proceeding on February 16, 1967.

OPINIONS BELOW

The opinion of the Court of Appeals (p. 1a, *infra*) is reported at 373 F. 2d 633. The opinion of the District Court for the District of Maryland (p. 5a, *infra*) is reported at 253 F. Supp. 485.

JURISDICTION

The judgment of the Court of Appeals (p. 4a, *infra*) was entered on February 16, 1967. On May 6, 1967, the Chief Justice signed an order extending the time for filing this petition for writ of certiorari to and including July 15, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the constitutional standards of obscenity, as enunciated in *Roth* v. *United States*, 354 U.S. 476, and related decisions, must be modified in the context of an *in rem* libel proceeding so as to encompass all possible uses of the alleged obscene matter.

2. Whether certain imported magazines containing pictures of undressed men and women, in the context of a customs libel against the magazines themselves under 19 U.S.C. § 1305(a), can be considered obscene under federal constitutional standards, particularly in the absence of any claim or proof that they would be available to juveniles, or that they would be obtrusively thrust upon unwilling individuals, or that they would be distributed by means of pandering or sexual exploitation.

3. Whether the administrative and judicial scheme authorized by Congress in 19 U.S.C. § 1305(a) for resolution of the question whether material sought

to be imported into the United States is obscene, as here applied to justify a prolonged administrative seizure without an immediate judicial determination as to obscenity, constitutes an unconstitutional prior restraint upon the importation and distribution of the material in question.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment I, Constitution of the United States:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and petition the Government for a redress of grievances.

Title 19, United States Code, Section 1305(a):

> All persons are prohibited from importing into the United States from any foreign country * * * any obscene book, pamphlet, paper, writing, advertisement, circular, print, picture, drawing, or other representation, figure, or image on or of paper or other material, or any cast, instrument, or other article which is obscene or immoral * * *. No such articles whether imported separately or contained in packages with other goods entitled to entry, shall be admitted to entry; and all such articles and, unless it appears to the satisfaction of the collector that the obscene or other prohibited articles contained in the package were inclosed therein without the knowledge or consent of the importer, owner, agent, or consignee, the entire contents of the package in which such articles are contained, shall be subject to seizure and forfeiture as hereinafter provided * * *.

Upon the appearance of any such book or matter at any customs office, the same shall be seized and held by the collector to await the judgment of the district court as hereinafter provided: and no protest shall be taken to the United States Customs Court from the decision of the collector. Upon the seizure of such book or matter the collector shall transmit information thereof to the district attorney of the district in which is situated the office at which such seizure has taken place, who shall institute proceedings in the district court for the forfeiture, confiscation, and destruction of the book or matter seized. Upon the adjudication that such book or matter thus seized is of the character the entry of which is by this section prohibited, it shall be ordered destroyed and shall be destroyed. Upon adjudication that such book or matter thus seized is not of the character the entry of which is by this section prohibited, it shall not be excluded from entry under the provisions of this section.

In any such proceeding any party in interest may upon demand have the facts at issue determined by a jury and any party may have an appeal or the right or review as in the case of ordinary actions or suits.

STATEMENT OF THE CASE

On February 3, 1966, two separate shipments of magazines imported from Denmark arrived in the port of Baltimore, Maryland. The first shipment consisted of 3000 copies of "Review International", Vol. 6; the second shipment consisted of 1000 copies of "International Nudist Sun", Vol. 16. Both shipments were consigned to custom house brokers on behalf of the claimant and petitioner herein, Central Magazine Sales, Ltd. The magazines in both instances contained

full page pictures of undraped male nudes, interspersed with various short articles on health and nudism. They will be referred to herein as the "male nudist magazines."[1]

Five days later, on February 8, 1966, a similar importation arrived in Baltimore from Denmark, composed of 392 copies of a magazine entitled "Exclusive". This shipment was also consigned to brokers on behalf of the claimant-petitioner. This magazine, denominating itself an "international Art Magazine", contained full page pictures of nude and semi-nude women. No articles of textual matter, other than a brief introductory statement, appeared in the magazine.[2]

After about two weeks of administrative consideration of these magazines by customs officials, they were referred to the United States Attorney in Baltimore for the institution of libel proceedings. On February 17, 1966, those proceedings were actually instituted. Having been given notice, the petitioner-claimant filed answers to the respective libels. Thereafter, on March 9 and 10, 1966, a trial without jury took place before Chief Judge Thomsen. Both the Government and the petitioner produced witnesses and examined and cross-examined them.

On April 4, 1966, the District Court entered an extensive written opinion (pp. 5a-28a, *infra*) and an

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[1] A copy of "Review International" was introduced into the record as the Government's Exhibit 2; a copy of "Interdational Nudist Sun" was introduced as the Government's Exhibit 3.

[2] A copy of "Exclusive" was introdnced as the Government's Exhibit 1.

order (p. 28a, *infra*) finding that the three magazines were obscene within the meaning of 19 U.S.S. § 1305 and ordering their destruction on May 6, 1966. The District Court also concluded in its opinion and order that § 1305 on its face is not unconstitutional and that § 1305 had not been applied unconstitutionally in this instance.

Thereafter the Fourth Circuit affirmed the determinations of the District Court. It held that § 1305 was constitutional, both "facially and as applied in this case." And it agreed that the magazines were obscene, mainly for "the reasons stated by the District Court as supplemented by our opinion in *Potomac News*." See *United States* v. *Potomac News Co.*, 373 F. 2d 635 (C.A. 4), now pending before this Court on certiorari, No. 164, Oct. Term, 1967.

A. The Procedural Events

As already indicated, the shipments of the three magazines began arriving in Baltimore on February 3, 1966. On that date the male nudist magazines began their long journey through the inspection procedures established by customs officials in the port of Baltimore. This journey is detailed in the record at Tr. 54-207, *passim*.

The first customs official to inspect the magazines was the Line Examiner, who determined that their admissibility was questionable and therefore referred them to the Customs Appraiser.

The Customs Appraiser, the second customs official to inspect them, apparently concurred in the Line Examiner's judgment and therefore passed them on to

the third inspection level, a group of customs officials located in the Collector's Office called "The Obscene Literature Committee." This committee also questioned the legal propriety of these publications. The exhaustion of this three-step procedure consumed five days.

The male nudist magazines were then forwarded to the Bureau of Customs in Washington, D. C., where for the fourth time their legal propriety was examined and there it was decided the magazines should be forwarded to the United States Attorney in Baltimore for determination of whether libel proceedings should be instituted. However, before these magazines were submitted to the United States Attorney for the institution of libel proceedings, they were technically seized by the customs officials and impounded. See Tr. 144-145.

On February 17, 1966, *two weeks* after the date of their arrival, these publications failed to survive the fifth inspection level and libel actions were instituted.

The petitioner-claimant never received notice of the confiscation of these magazines until February 19, *sixteen days* after their arrival in the United States. The petitioner was then given the opportunity to show cause on or before March 8th, 1966, why these publications should not be forfeited. On February 26, the day after counsel had been engaged, a letter was sent to the Clerk of the United States District Court for the District of Maryland demanding an immediate trial of each of the libel actions pending against the publications.

On March 4, 1966, at a pre-trial conference conducted by the Hon. Roszel C. Thomsen, the demand for an

immediate trial was repeated by counsel for the petitioner. The United States Attorney was unable to proceed to trial until March 9th, 1966, *thirty-four* days after the publications' arrival in the United States. The trial lasted two days.

On March 21st, the day the United States Supreme Court decided the *Mishkin, Ginzburg* and *Fanny Hill* cases and forty-six days after the arrival of the magazines, these three actions were still undecided.

On or about March 22nd an application was made by petitioner's counsel to Judge Thomsen for permission to submit a supplemental brief discussing the impact of the *Mishkin, Ginzburg* and *Fanny Hill* cases upon the cases at bar. This permission was obtained on or about March 24th, and on March 27th the supplemental brief was forwarded to Judge Thomsen's chambers.

On April 4, 1966, Judge Thomsen decided that the male nudist magazines and "Exclusive" were obscene.

It thus took exactly sixty days, under the procedures established by the customs officials, for the petitioner to get a determination that these publications were obscene.

The chronology of the journey of "Exclusive" through these complex inspection procedures is identical to that of the male nudist magazines, except that the trip was shortened by five days because of its later arrival in the United States on February 8, 1966. But it still took fifty-five days to determine the legal propriety of "Exclusive."

There follows a chart which traces the travels of these publications through the maze of the United States Customs inspection procedures:

	Date	Number of days Expired from Date of Arrival and First Inspection.
Male nudist publications received entry number:*	Feb. 3rd	-0-
Inspections conducted by (1) Line Examiner, (2) Appraiser, and (3) the Obscene Literature Committee:	Feb. 3rd through Feb. 8th	5 days
Publications submitted to Bureau of Customs in Washington:	Feb. 8th	5 days
Seizure of publications by Customs officials:	Feb. 11th	8 days
Submitted to United States Attorney to determine propriety of libel proceedings:	Feb. 14th	11 days
Libel proceedings instituted:	Feb. 17th	14 days
Notice to appellant of libel proceedings:	Feb. 19th	16 days
Date libel proceedings returnable:	Mar. 8th	33 days
Commencement of trial:	Mar. 9th	34 days
Decision of Court:	Apr. 4th	60 days

* The receipt of the entry number starts the inspection procedures.

B. The Government's Proof of Obscenity

Other than the witness produced by the Government to prove the ponderous procedures used in evaluating the legal propriety of an imported publication, there was only one witness who testified on the subject of the publications' alleged obscenity. Doctor Manfred S. Guttmacher, a psychiatrist and Chief Medical Officer of the Supreme Bench of Baltimore City, testified that in his opinion the male nudist publications would appeal "to all homosexual males, all males who have ever been actively homosexual; I think, also, to some latent homosexual males". Tr. 21. When asked what he understood prurient interest to mean, he replied:

> "Something which excites the sexual position; something which is lascivious, I think." Tr. 21.

Doctor Guttmacher, after examining "Exclusive," was unable to render any opinion about its prurient appeal to any one.

Both the Government and the defense psychiatrists agreed that Kinsey's figures disclosing that 37% of the male population experience one or more homosexual episodes after adolescence was reasonably accurate. This group was used by both psychiatrists in rendering their opinions.

When Doctor Guttmacher was asked on cross-examination if all of the 37% would be sexually excited by the nudist publications, he replied:

> "I would have no way, really, to answer that question. I would think a considerable percentage of them would be; but I would think it is quite pos-

sible that a fairly large segment of them would not be. But I cannot give you percentages on that.

Q. You think there would be a large percentage of them who might be affected, of that larger group?

A. I think there might be a large percentage; yes. I think there would be a significant percentage who would not be." Tr. 27-28.

Doctor Guttmacher, with commendable candor, admitted that he had made no attempt to validate these figures and that he was simply "theorizing". Tr. 31.

C. The Petitioner's Proof

Doctor Jonas R. Rappaport, a psychiatrist, testified on behalf of the defense. He is the Chief Medical Officer of the Circuit Court for Baltimore County, a member of the Governor's Commission on the Review of Criminal Law, and President of the Maryland Psychiatric Society. He testified that the three publications at bar would not appeal to the average person's prurient interest. Tr. 211.

Of the 37% group of homosexuals found by Kinsey, Doctor Rappaport felt that only a "very small percentage of these people would be sexually stimulated to any extent by these two [male nudist] magazines; by a small percentage, perhaps, of that 37%, 10 or 20% might be." Tr. 219.

Offered on behalf of the petitioner were other publications which have been approved by U.S. Customs as not being obscene. Also offered were other books

similar to the books at bar which had been adjudicated not obscene:

Deft's. Exhibit Number	Title of Exhibit
3	Solis No. 83
4	Sun and Sport No. 25
5	Playgirl No. 20
6-A	Phyrne No. 12
6-B	Nymphs No. 23
7	Revue No. 62
8	Revue No. 60
9	International Nudist Sun No. 11
11	Sun and Sport No. 16
12 thru 22	International Nudist Sun, Nos. 8, 10, 9, 12, 4, 2, 5, 11, 7, 6, 13.

The publications above enumerated, which were received by the District Court and considered by it in rendering its opinion, are virtually identical to the publications here involved. Each had specifically been approved by the United States Customs officials, both before and after the institution of the libel proceedings against the instant magazines. They were offered to the Court as some evidence of contemporary community standards and also as identical material which had been administratively adjudicated as not obscene.

Solis No. 83, *Sun and Sport No. 25* and *Playgirl No. 20*, cleared customs contemporaneously with the institution of the instant libel suits. *Solis 83* was held for 16 days, *Sun and Sport No. 25* was held for 21 days and *Playgirl No. 20* was held for 14 days. This would seem to refute the testimony of the Customs Agent during the trial that the normal delay of holding a magazine for inspection purposes is only a couple of days.

Revue No. 37, (Def't. Ex. 10) was found not obscene in the case of *Royal News Company* v. *Dewey Schultz*, in the United States District Court for the Eastern District of Michigan. Tr. 260.

International Nudist Sun No. 2 and *Nudist Times*, (Def't. Ex. 23-A thru F, R. p. 66), were found not obscene in *Commonwealth of Pennsylvania* v. *Robert Platt and William Morris*, by Judge Aldisert of the Pennsylvania Court of Quarter Sessions, Allegheny County. The *International Nudist Sun No. 2*, found not obscene in the Pennsylvania case under the *Roth* test, is virtually identical to the two male nudist magazines here involved.

Sunshine and Health and *Sun Magazine* were found not obscene in *Sunshine Book Company* v. *Summerfield*, 355 U.S. 372 (Def't. Ex. 25).

One, the homosexual magazine, was found not obscene in *One, Inc.* v. *Olesen*, 355 U.S. 371 (Def't. Ex. 26).

There was also offered on petitioner's behalf a group of exhibits, representing material similar to the magazines here in issue, which had been purchased in public book stores in Baltimore. Def't. Ex. 27-A thru S.

REASONS FOR GRANTING THE WRIT

1. THE RULING BELOW RAISES SIGNIFICANT QUESTIONS AS TO THE STANDARDS TO BE APPLIED UNDER 19 U.S.C. § 1305 IN DETERMINING THE OBSCENITY OF PRINTED MATTER SOUGHT TO BE IMPORTED INTO THE UNITED STATES.

The Fourth Circuit has here ruled (p. 3a, *infra*) that the magazines in question, which were sought to be imported into the United States, are obscene within the meaning of 19 U.S.C. § 1305 for "the reasons stated by the District Court as supplemented by our

opinion in *Potomac News.*" See *United States* v. *Potomac News Co.*, 373 F. 2d 635 (C.A. 4), now pending before this Court on petition for writ of certiorari, No. 164, Oct. Term 1967.

In other words, the Fourth Circuit has adopted *in toto* the District Court's view (see pp. 17a-28a, *infra*) that the guidelines for determining the obscenity issue under § 1305 are those set forth in the unrelated context of *Roth* v. *United States*, 354 U.S. 476, 489, as elaborated in subsequent cases. See *Jacobellis* v. *Ohio*, 378 U.S. 184, 191; *Memoirs* v. *Massachusetts*, 383 U.S. 413, 418; *Mishkin* v. *New York*, 383 U.S. 502, 508-509. Finding that the District Court's conclusions were abundantly supported by the record, the Fourth Circuit has therefore ruled:

(a) The male nudist magazines "have very strong prurient appeal to almost all exclusively homosexual or bisexual males and some prurient appeal to a large percentage of latent homosexuals and some adolescent males," as well as to a few female adolescents. See p. 20a, *infra*. The Fourth Circuit added its own conclusion that these magazines appeal to homosexual males under the *Mishkin* "adjustment" of the *Roth* prurient appeal standard, and stated that they "were designed primarily for the exploitation of that interest." See p. 3a, *infra*. The *Exclusive* magazine containing pictures of nude and semi-nude females was found to "appeal to the prurient interest of the average male, and particularly to the prurient interest of the adolescent male." See p. 20a, *infra*.

(b) The male nudist magazines, while admitted to be "borderline material" in the light of "the Supreme

Court cases," were found to be "patently offensive," at least until "the binding authorities are clarified." See pp. 26a-27a, *infra*. That offensiveness was found to reside in the highlighting of the male genitalia in the pictures. And the revelation of the genital areas of the pictured females was held to render the *Exclusive* magazine "patently offensive." See p. 26a, *infra*.

(c) The male nudist magazines were found to be "utterly without any artistic significance or other redeeming social value," despite the admittedly "innocuous" textual matter dealing with the values of sunbathing and nature-living. See p. 28a, *infra*. And *Exclusive* magazine, containing the female pictures, was likewise found to be "utterly without social importance or value." See p. 27a, *infra*. The brief introductory statement in that magazine, stating that its design was "exclusively to furnish serious artists and persons interested in art, who have some difficulty to find living models, with suitable photographs to be used as a substitute," was found to be a "subterfuge."

In thus finding these magazines "obscene" under the *Roth* standards for purposes of § 1305, the Fourth Circuit has created several significant problems—of both constitutional and statutory dimensions—warranting this Court's full consideration. And the constantly recurring nature of those problems, stemming from the constant flow of books, magazines and other materials into the United States from other lands, makes the questions here presented of far more than parochial concern to this petitioner alone.

A. Can the Roth Standards Be Applied Without Modification in Determining the Issue of Obscenity in the Context of an in Rem Libel Proceeding?

In determining the obscenity issue, the Fourth Circuit approved the application of the *Roth* standards without considering whether any modification or alteration of those standards was necessitated by the *in rem* nature of the instant libel proceedings. Those standards were originally developed by this Court for use in actions *in personam*. See *Roth* v. *United States*, 354 U.S. 476. But in *Memoirs* v. *Massachusetts*, 383 U.S. 413, 420-421, involving an *in rem* action against a book, Mr. Justice Brennan announced a significant qualification of the *Roth* standards as applied to *in rem* proceedings:

> In this proceeding, however, the courts were asked to judge the obscenity of *Memoirs* in the abstract, and the declaration of obscenity was neither aided nor limited by a specific set of circumstances of production, sale, and publicity. *All possible uses of the book must therefore be considered*, and the mere risk that the book might be exploited by panderers because it so pervasively treats sexual matters cannot alter the fact—given the view of the Massachusetts court attributing to *Memoirs* a modicum of literary and historical value—that the book will have redeeming social importance in the hands of those who publish or distribute it on the basis of that value. [Emphasis added.]

In other words, when viewing a book or magazine in the abstract atmosphere of an *in rem* proceeding, the *Roth* standards of obscenity must be altered and expanded to include all possible uses of the material. Just as the "social importance" criteria was expanded in *Memoirs* to cover all conceivable uses, so too must

the "prurient interest" and "patent offensiveness" concepts be enlarged to encompass all conceivable recipients and uses of the material. If valid uses can be discerned, if there be legitimate interests and values involved in the potential distribution of the material, then those uses, interests and values are entitled to First Amendment protection against censorship or destruction of the material. And those who publish or distribute on the basis of such uses, interests and values, as the *Memoirs* decision indicates, cannot be deprived of their publishing or distributing rights.

But neither the Fourth Circuit nor the District Court made the slightest effort in this proceeding to inject the *Memoirs* notion of "all possible uses" into the *Roth* standards for purposes of assessing in the abstract the obscenity of the magazines involved in the customs seizure. Instead, these courts contented themselves with finding that the magazines would appeal "primarily" to homosexuals, or that the pictures would appeal "to a large percentage" or to "some" of the described groups. And while emphasizing the genitalia displays as indicating that the magazines were patently offensive and utterly without redeeming social importance, the courts below conceded that nudity per se is neither offensive nor without some social importance and that the male nudes here involved were no more than "borderline material." Such qualified and limited determinations suggest that there very well may be legitimate uses for the magazines in question. Nothing that the courts below found can eliminate the possibility that some non-deviate groups—be they artists, photographers, sociologists, nature-lovers, or

serious students of foreign publications and culture—may find some value in these magazines, being neither offended nor pruriently aroused by the pictures. If there be such groups, the *Memoirs* rule would dictate that these magazines should be allowed admission into the United States for distribution and sale to those groups.

It accordingly becomes appropriate for this Court to explore with precision the modifications of the *Roth* standards which must be made in assessing the obscenity of foreign publications subjected to *in rem* seizure proceedings. The basic question to be answered is whether there can be a constitutionally permissible finding of obscenity in such an abstract libel proceeding without clear and convincing proof by the Government that absolutely no legitimate interests or values can conceivably adhere to the seized material.

B. Can Material Found To Be Obscene Under the Roth Standards Be Totally Barred From Importation and Distribution, Including That Which May Not Be Available to Juveniles, or Obtrude Upon Individual Privacy, or Involve Any Kind of Pandering or Sexual Exploitation?

In finding these magazines obscene under the *Roth* standards, the Fourth Circuit has approved the indiscriminate destruction of all the magazines without regard to whatever legitimate values and interests some groups might possess. And it has done so in the absence of any claim or proof that, if distribution were allowed on the basis of such values and interests, the material might or would be available to juveniles, or might or would intrude upon the privacy of those who would be offended by the magazines, or might or would

be distributed by means of pandering or exploiting the sexual aspects of the magazines.[8]

Thereby is raised a most serious constitutional and statutory question, one that is intimately related to the problem just discussed as to the necessary adjustment of the *Roth* standards to an *in rem* libel proceeding. If there are found to be legitimate values and interests through application of the adjusted *Roth* standards, how can the constitutionally necessary respect be paid those values and interests if total and indiscriminate destruction of the materials has been ordered? In the absence of an invasion of some other recognized governmental or private concern, can a distribution designed to serve those values and interests be denied simply because the material is otherwise thought by some people to be offensive, pruriently appealing or without social value?

The answer to those questions has been suggested in the recent *per curiam* ruling of this Court in *Redrup* v. *New York*, 386 U.S. 767. The Court there ruled that under either the *Roth* standards or the other views held by certain members of the Court "the distribution of the publications in each of these cases is protected by the First and Fourteenth Amendments from governmental suppression, whether criminal or civil, *in personam* or *in rem*." But in permitting the distri-

[8] Cf. the situation in *Potomac News*, now pending before this Court, No. 164, Oct. Term 1967. There apparently was evidence in that case as to the intended and extremely high sale prices of the imported magazines; and the prospective distributor had included the magazines there involved in what was described as "a catalogue of homosexual material." No such evidence or catalogue is here involved.

bution of those publications, which in one degree or another pervasively treated sexual matters, the Court emphasized that (a) there was no claim "that the statute in question reflected a specific and limited state concern for juveniles," (b) there was no "suggestion of an assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it," and (c) there was no "evidence of the sort of 'pandering' which the Court found significant in *Ginzburg* v. *United States*, 383 U.S. 463."

Redrup thus seems to say that once a publication has survived the constitutional tests of obscenity it is not to be denied distribution that is designed to satisfy legitimate values and interests. Only that distribution which in some manner is considered harmful to juveniles, or intrudes upon individual privacy or involves pandering or sexual exploitation may be circumscribed.

Application of the *Redrup* rule would seem peculiarly appropriate in an *in rem* customs seizure proceeding, deveid as it is of all issues save that of the abstract obscenity of the seized material. The seizure statute, 19 U.S.C. § 1305(a), is in no way designed to reflect a limited governmental concern for juveniles. It is not written so as to bar importation or distribution of that which may be obtrusively thrust upon unwilling individuals. Nor is the statute directed in any way toward the sort of pandering condemned in the *Ginsburg* case. Section 1305 simply bans the importation of any "obscene" matter. And that proscription must be resolved in any given case prior to any actual distribution or sale of the seized materials. The material must be viewed in the abstract, as in the *Memoirs* case. Once the material has been found non-obscene

in accordance with the *Roth* standards, as adjusted to fit such an *in rem* and abstract proceeding, *Redrup* would indicate that the materials may not then be destroyed or denied distribution simply because of the sexual aspects contained therein. If the subsequent distribution does involve any of the three elements mentioned in *Redrup*, it is not a matter of concern or even conjecture in a § 1305 proceeding. At that later time federal or state authorities may take whatever action is constitutionally permissible to restrict distribution techniques thought to be harmful.

Consideration of the implications of the *Redrup* ruling in the context of a § 1305 seizure proceeding is obviously important and worthy of this Court's attention. Related as that problem is to the question of the necessary adjustment of the *Roth* obscenity standards to such a proceeding, the answers that this Court can provide will serve as a charter long needed to guide customs officials and lower courts in resolving perplexing obscenity problems under § 1305.

C. Did the Lower Courts Properly Apply the Unadjusted Roth Standards of Obscenity?

Even if the Fourth Circuit's application of the unadjusted *Roth* standards to a § 1305 *in rem* proceeding be accepted, serious questions are raised as to the proper use of those standards in this case.

(1) As approved by the Fourth Circuit, the District Court found (see p. 20a, *infra*) that the "prurient interest" standard was satisfied in part by virtue of the appeal of the male nudist magazines to "adolescent males" and to "female adolescents." And the *Exclusive* magazine, containing the nude female pictures,

was found to appeal "particularly to the prurient interest of the adolescent male." See p. 20a, *infra*.

Thus to premise the findings of prurient appeal in terms of adolescents is to adopt a standard rejected time and again by this Court. Normal male and female adolescents are simply sexually immature persons who are considered to be particularly susceptible individuals in terms of sexual stimuli. But in the development of the *Roth* standard of requiring proof of an appeal to the prurient interest of "the average person," this Court took pains to reject that aspect of the *Hicklin* test, *Regina* v. *Hicklin*, [1868] L.R. 3 Q.B. 360, that made the impact on the most susceptible persons determinative. *Roth* v. *United States*, 354 U.S. at 489-490. And it was rejected "as unconstitutionally restrictive of the freedoms of speech and press" since it "might well encompass material legitimately treating with sex." *Ibid.*, at 489. In short, a book or magazine may not be banned merely to shield juvenile or adolescent innocence. *Butler* v. *Michigan*, 352 U.S. 380.

The reincarnation of the *Hicklin* test in the proceedings below cannot be justified. And the improper reliance upon the appeals of the three magazines to the prurient interests of perfectly normal adolescents so completely permeated the lower courts' conclusions respecting the *Roth* standard of prurient interest as to necessitate reversal of the judgment below.

(2) The Fourth Circuit, in affirming the District Court's conclusion as to the patent offensiveness of these magazines, necessarily gave approval to the District Court's concession that nudity per se is not offensive and that the male nudist magazines, in light of the decisions of this Court, at the most are "border-

line material." As the lower courts thus impliedly recognized, a serious question is here raised as to the offensiveness of photographic portrayals of nude males and females, portrayals which by their intrinsic nature revealed genital areas.

It was recognized in *Manual Enterprises* v. *Day*, 370 U.S. 478, 490-491 (opinion of Harlan, J.), that "not every portrayal of male or female nudity is obscene" and that photographs of males that highlighted without exposing the genital areas were not indecent in the constitutional sense, however "dismally unpleasant, uncouth and tawdry" they might be. In addition, portrayals of nude men and women, including the exposure of genital areas, have frequently been held non-obscene, at least where no sexual activity or excitation was involved. See, e.g., *Sunshine Book Co.* v. *Summerfield*, 355 U.S. 372; *Rosenbloom* v. *Virginia*, 387 U.S. ... (June 12, 1967). The combination of these cases, plus the rather extended administrative history of admitting through customs magazines of virtually identical photographic content, raises a serious question as to the constitutional propriety of the ruling below that the portrayals in question were patently offensive, a question which is not answered by the lower courts' rather frantic effort to find some evidence of sexual excitation in the pictures.

The District Court held that "the binding authorities" of this Court did "not prevent it from holding that the material is patently offensive." See p. 27a, *infra*. Just what those binding authorities were thought to be was not specified. In fact, however, the rulings of this Court point in the precisely opposite direction, thereby augmenting the appropriateness of

clarifying those rulings still further for the benefit of lower courts.

(3) The ruling below that the portrayals of these nude males and females are utterly without redeeming social value raises the ultimate question whether any such portrayal has human or social value. That ruling would seem to incorporate too cynical a view of the individual and his body. When one considers the legitimate pleasure, value and education that some persons may derive from viewing such pictures, who can say that the pictures are utterly without redeeming value? Certainly it is no answer that most people may think such portrayals to be in bad taste or unrefined or even trash. See *Hannegan* v. *Esquire, Inc.*, 327 U.S. 146. The problem here is to perceive and appreciate *possible* values—in the context of contemporary community standards and mores—rather than to impose one's own view and evaluation of the pictures in question. But the courts below ignored that problem. It deserves further consideration by this Court.

2. THE RULING BELOW RAISES AN IMPORTANT QUESTION WHETHER 19 U.S.C. § 1305(a), AS HERE APPLIED TO JUSTIFY A PROLONGED ADMINISTRATIVE SEIZURE WITHOUT AN EXPEDITIOUS JUDICIAL DETERMINATION AS TO OBSCENITY, CONSTITUTES AN UNCONSTITUTIONAL PRIOR RESTRAINT UPON THE IMPORTATION AND DISTRIBUTION OF THE MAGAZINES IN QUESTION.

Many years ago this Court cautioned that a previous restraint upon the dissemination of any form of writing or speech is a form of infringement upon freedom of expression to be especially condemned. *Near* v. *Minnesota ex rel. Olson*, 283 U.S. 697. Chief Justice Hughes there wrote, p. 716, that the historic and constitutional conception of liberty of the press "has meant, princi-

pally, although not exclusively, immunity from previous restraints or censorship." And see *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495, 503; *Thomas* v. *Collins*, 323 U.S. 516, 540.

The *Near* case recognized, of course, that "the protection even as to previous restraint is not absolutely unlimited" and that "the primary requirements of decency may be enforced against obscene publications." 283 U.S. at 716. But even as to such exceptional cases where some form of prior restraint might be permissible, the restraint itself "comes to this Court bearing a heavy presumption against its constitutional validity." *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 70. And the irreducible requirement for tolerating any system of prior restraints in the exceptional situation is that it be "operated under judicial superintendence and . . . [give assurance of] an almost immediate judicial determination of the validity of the restraint." *Ibid.*, 70.

Tested by that standard, the procedure employed in the instant proceeding in the application of 19 U.S.C. § 1305(a) must be considered constitutionally deficient. And the ruling below sustaining that procedure raises a most significant issue warranting this Court's attention. Section 1305(a) by its terms contains no requirement of an immediate judicial hearing as to the obscenity issue, although nothing in the statutory language precludes such immediate judicial action if the Government agents are so minded to seek it. See *United States* v. *One Book Entitled "The Adventures of Father Silas,"* 249 F. Supp. 911, 915-919 (S.D.N.Y.). But even assuming that § 1305(a) on its face is constitutional and that it can be applied in a constitutional

manner, its application in this instance was devoid of the prompt judicial superintendence of the obscenity allegation which alone can legitimatize a prior detention, seizure or condemnation of printed matter.

The record here is clear that the magazines in question were seized and withheld from public circulation by customs officials for a period of two weeks following their arrival in Baltimore and prior to the institution of judicial proceedings. The seizure during that period was premised solely on the ex parte administrative determination that the magazines were obscene. And all of that period was presumably devoted to a visual examination by various officials of approximately 72 full page photographs, with short articles interspersed in two of the magazines. Even the slowest of readers should be able to absorb such material within a short period, perhaps a quarter of an hour at the most.

Yet not until four sets of customs officials had devoted 11 days to this process of examination and reexamination and review and more review was the matter transmitted to the United States Attorney in Baltimore for the institution of libel proceedings. Those proceedings were not instituted until February 17, 1966, two weeks after the arrival of the male nudist magazines in Baltimore. Not until February 19 did the petitioner have notice of the filing of these proceedings, the return date being given as March 8. Despite the petitioner's desire for an earlier trial, the United States Attorney was unable to proceed to trial until March 9—some 34 days after the initial arrival of the magazines in Baltimore. And the first and only determination by the District Court of the obscenity of

these publications was not forthcoming until April 4, 1966—some 60 days after the initial importation.[4]

The conclusion that the time taken in administrative examination and discussion prior to judicial action was unreasonably long seems both fair and unavoidable, particularly in light of the nature of the material and its susceptibility to quick perusal and evaluation. The textual matter here involved was, by common consent, brief and innocuous and non-obscene. The critical matter was the photographs, which lent themselves to the quickest possible evaluation.

The fact stressed by the District Court, p. 13a, *infra*, that the photographs in question are "almost timeless" in nature and not likely to lose much of their value if there be a substantial delay in judicial determination cannot serve as an excuse for a prior restraint on their dissemination. While undoubtedly the public interest and the constitutional concern in prompt dissemination is greater as to some materials than as to others, the applicability of the prior restraint doctrine has not heretofore been made dependent upon the "timeless" quality of the materials involved. The so-called "girlie" magazines, nudist magazines, treatises and manuals on sex, photography magazines, cartoon and joke books, and still photographs seized in *Marcus* v. *Search Warrant*, 367 U.S. 717, can hardly be described as less "timeless" than the magazines here involved. Yet the Court there outlawed the seizure program because *inter alia* there was "no limitation on the time within which [judicial] decision must be made" and

[4] Petitioner did, of course, request leave to file a supplemental brief with the District Court, after trial, to discuss the impact of the *Ginsburg*, *Mishkin* and *Memoirs* cases. But the petitioner forwarded the brief to the court three days after leave was granted.

"in fact over two months elapsed between seizure and decision." 367 U.S. at 737.[5]

That the period of detention here was unreasonably long is a conclusion fortified by a comparison of the time periods held to be inordinately long, thereby constituting an invalid prior restraint on publication, in other situations before this Court. See, e.g., the two-month period between the seizure of more than 280 publications and the judicial decision as to the obscenity thereof in *Marcus* v. *Search Warrant, supra;* the seven-week period between the seizure of 31 paperback novels and the judicial determination of their obscenity in *A Quantity of Books* v. *Kansas,* 378 U.S. 205, 213; and see also the three to four month delay between the seizure of three different books and the institution of libel proceedings in *United States* v. *One Book Entitled "The Adventures of Father Silas,"* 249 F. Supp. 911, 915 (S.D.N.Y.). Such a comparison lends weight to the conclusion that the delays in this proceeding were not consistent with the constitutional necessity of preserving the status quo prior to public dissemination "for the shortest fixed period compatible with sound judicial resolution." *Freedman* v. *Maryland,* 380 U.S. 51, 59.

Moreover, the action of the customs officials—after the critical events in the instant proceeding—in changing the procedures in order to obtain a more prompt

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[5] In *United States* v. *One Book Entitled "The Adventures of Father Silas,"* 249 F. Supp. 911 (S.D.N.Y.), one of the books sought to be imported was DeSade's "Justine"—originally published in Paris in 1791. A delay of three to four months to permit customs officials to read and evaluate this 175-year old book, which might be described as "timeless," was held to be unreasonable and to constitute improper prior restraint.

judicial determination of the obscenity issue (see pp. 13a-15a, *infra*) is tantamount to a confession that the procedures theretofore employed and actually followed in this case were inadequate. And that change serves to overcome any plea of administrative overwork or burden in support of the undue lag in this instance.

The decision below presents an occasion for this Court to remind customs officials that § 1301(a) cannot be utilized to impose an invalid prior restraint on imported magazines. The constitutional requirement of an "immediate judicial determination of the validity of the restraint" must again be reinforced by the grant of certiorari in this case.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari to review the judgment and opinion of the Fourth Circuit should be granted.

Respectfully submitted,

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